United States v. Perillo, 560 F. 2d 560 (2d Cir. 1977)

Personal authorization by the Attorney General or a specially designated Assistant Attorney General is required for wiretap applications under 18 U. S. C. sec. 2516(1).

Summary

In United States v. Perillo, the Second Circuit Court of Appeals upheld the validity of a wiretap order against challenges that the Attorney General, John Mitchell, did not personally authorize the application. The court found sufficient evidence that Mitchell had personally approved the wiretap despite his inability to remember doing so. The court emphasized the strict requirement for personal authorization under the wiretap statute but concluded that the evidence presented, including testimony and a correspondence record, supported the authorization. The case also addressed the standard for challenging wiretap affidavits, rejecting the petitioners' claim of false information based on insufficient evidence.

Facts

In 1971, James Perillo and others were under investigation for illegal gambling in Brooklyn, New York. A wiretap was authorized by a federal court order following a memorandum from Attorney General John Mitchell on December 3, 1971, authorizing the application. Perillo later pleaded guilty to gambling charges but challenged the wiretap's validity in a subsequent civil tax case, claiming Mitchell did not personally authorize it. The December 3 memorandum bore handwritten initials "JNM," which Mitchell could not confirm as his own, though they resembled his initials. Testimony from Mitchell's executive assistant, Sol Lindenbaum, and a correspondence record indicated Mitchell's personal authorization.

Procedural History

The wiretap was authorized by the Federal District Court for the Eastern District of New York on December 6, 1971. Perillo challenged the wiretap's validity in a civil tax case, leading to a motion to suppress the evidence obtained from the wiretap. The Second Circuit Court of Appeals reviewed the case and denied the motion to suppress, affirming the wiretap's validity.

Issue(s)

1. Whether the Attorney General personally authorized the wiretap application as required by 18 U. S. C. sec. 2516(1).

2. Whether the petitioners made a substantial preliminary showing of false information in the wiretap affidavit to justify a preliminary hearing.

Holding

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1. Yes, because the court found sufficient evidence, including testimony and a correspondence record, that Attorney General Mitchell personally authorized the wiretap application.

2. No, because the petitioners failed to make a substantial preliminary showing of false information in the affidavit, relying only on weak inferences from a book by a former FBI agent.

Court's Reasoning

The court applied the strict statutory requirement for personal authorization of wiretap applications, as emphasized in United States v. Giordano and United States v. Chavez. The court considered Mitchell's testimony that he did not remember authorizing the wiretap but noted his acknowledgment that the initials on the memorandum resembled his own. Lindenbaum's testimony and the correspondence record provided additional evidence of Mitchell's personal involvement. The court rejected the petitioners' argument about the absence of the original memorandum, citing United States v. Iannelli, where a similar challenge failed. The court also applied the Franks v. Delaware standard for challenging the veracity of affidavits, finding the petitioners' evidence insufficient to warrant a hearing. The court emphasized the need for a substantial preliminary showing of false information, which the petitioners did not meet.

Practical Implications

This decision reinforces the requirement for personal authorization of wiretap applications by the Attorney General or a specially designated Assistant Attorney General, setting a high evidentiary standard for challenging such authorizations. It illustrates the court's willingness to consider various forms of evidence, including testimony and records, to determine compliance with statutory requirements. For legal practitioners, this case underscores the importance of thorough documentation and clear authorization processes in wiretap applications. It also serves as a reminder of the high threshold required to challenge wiretap affidavits, impacting how similar cases are approached in future litigation. This ruling has been cited in subsequent cases to uphold the validity of wiretap orders and to deny motions to suppress evidence based on alleged improper authorization.

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